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Supreme Court of the United States

OCTOBER TERM, 1954

No. 385

MARY I. DANIMAN, MEYER CASE, LOUIS COHEN, HENRY F. MINS, LOUIS RELIN, LOUIS SPINDELL, IRVING GLUCKSMAN and MORRIS SELTZER,

Appellants,

against

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Appellee.

VERA SHLAKMAN, BERNARD F. REISS, SARAH R. RIEDMAN, HENRIETTA A. FRIEDMAN and MELBA PHILLIPS,

Appellants,

against

THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK,

Appellee.

MOTION TO DISMISS APPEAL

November 5, 1954

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THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK,

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

Petitioners in each of the above cases (consolidated and heard as one in the courts of New York state) are teachers either in the public schools or public colleges maintained

by the City of New York. They ask this Court to review a determination of the New York courts that these teachers, by invoking the Fifth Amendment to the Federal Constitution as a basis for refusing to answer questions put to them by the Internal Security Sub-Committee of the Committee on the Judiciary of the United States Senate, forfeited their positions pursuant to New York City Charter § 903.

We urge this Court to dismiss the appellants' proposed appeal on the following grounds:

1. There is no substantial Federal question presented since this Court has ruled that the terms and conditions of public employment and the right of tenure in state or municipal civil service do not present Federal questions;

2. These appellants did not present, nor did the courts below pass upon, the Federal questions which they now allege to exist. Accordingly, they have not reserved the right to raise them now.

I. No Substantial Federal Question Is Presented by the Attempted Appeal

The New York state courts have interpreted § 903 of the New York City Charter to mean (1) that teachers in the public schools and colleges maintained by the City of New York are city employees within the meaning of § 903; and (2) that the Internal Security Sub-Committee of the United States Senate is a legislative body within the meaning of the statute. This Court has consistently ruled that it will be bound by the interpretation given to a state statute by the highest court of that state. *Barsky* v. *Board of Regents*, 374 U. S. 442, 448 (1954); *Winters* v. *New York*, 333 U. S. 507, 514 (1948); *Mooley* v. *Lake Shore Railway Co.*, 146 U. S. 162, 167.

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The Court of Appeals also ruled that a state statute, such as Charter § 903, may impose, as a condition of public employment, an obligation on its employees to testify fully and freely, when questioned by a legislative committee, including one of the Committees of Congress not only on matters affecting the interests of the public employer, but also as to his own official conduct as a public employee.

This Court has held consistently that public employment by a state or one of its municipalities is a matter of local concern, including the terms and conditions of such employment, the tenure rights and conduct of employees and the fixing of wages. An exception to this general rule is where a state, as a condition of employment, promulgates a requirement that its employees must foreswear membership in subversive organizations, without distinguishing between employees' innocent or knowing association with such organizations. *Wieman* v. *Updegraff*, 344 U. S. 183 (1952). Cf. *Garner* v. *Board of Public Works*, 341 U. S. 716 (1951); *Adler* v. *Board of Education*, 342 U. S. 485 (1952). Clearly the instant case does not fall within this exception.

No provision of the Federal Constitution deprives a state of power to modify or change the conditions of such employment as the public interest may warrant. *Higginbotham* v. *Baton Rouge*, 306 U. S. 535 (1939), rehearing denied 307 U. S. 649; *Dodge* v. *Board of Education*, 302 U. S. 74, 78-9; *Butler* v. *Penn.*, 10 How. 402, 416-7 (1850). The removal of a state or municipal employee from public employment does not present a federal question. *Preston* v. *Chicago*, 226 U. S. 447 (1113); *Walton* v. *House of Representatives of Oklahoma*, 265 U. S. 487 (1924).

II. The Asserted Constitutional Question Was Not Timely Raised

The appellants did not urge in the state courts that any provision of the Federal Constitution had been violated in declaring their public employment forfeit. The first mention of the Federal Constitution occurred when, after the New York Court of Appeals had ruled adversely, the petitioners requested reargument and sought to induce that court to certify that its decision was based upon an interpretation of the Federal Constitution. This, the New York Court of Appeals refused to do.

In an attempt to explain their failure to raise in the state courts the Federal questions they now allege to exist, the petitioners claim that the decisions of the state courts, especially that of the Court of Appeals, "took us by surprise" (Brief, p. 9). This is an obvious pretense since the decision of the Court of Appeals was an affirmance of the majority decision of the Appellate Division, Second Department, which in turn affirmed the holding of the Supreme Court, Kings County.

WHEREFORE, appellees respectfully move that the within appeal be dismissed or that the judgment and decree of the Courts of the State of New York herein be affirmed.

Dated, New York, November 5, 1954.

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